

GAHC010166912021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRIMINAL APPEAL NO.172/2021

Jetuki Boro, S/o Late Rubul Boro, Village No. 2
Ghoga, Madlabari, Police Station- Mukalmua, District
- Nalbari, Assam,

.....Appellant

-VERSUS-

1. The State of Assam, Represented by Public Prosecutor, Assam.
2. Biren Boro, President of Village No. 2 Ghoga Madlabari, S/o Late Paniram Boro, Village - No. 2 Ghoga Madlabari, P.O.-Loharkata P.S.- Mukalmua, District –Nalbari, Assam, Pin-78112

.....Respondents

Advocates :

Appellant	:	Mr. N. Uddin, Advocate
Respondent no. 1	:	Ms. A. Begum, Additional Public Prosecutor, Assam
Date of Hearing, Judgment & Order	:	22.07.2024

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MR. JUSTICE KAUSHIK GOSWAMI

JUDGMENT & ORDER [ORAL]

[M. Choudhury, J]

The present criminal appeal under Section 374[2], Code of Criminal Procedure, 1973 [‘the Code’ or ‘the CrPC’, for short] has been preferred to assail a Judgment and Order dated 06.08.2021 passed by the Court of learned Special Judge, Nalbari [‘the Special Court’, for short] in NDPS Case no. 24 of 2019. By the Judgment and Order dated 06.08.2021, the learned Special Court has convicted the accused-appellant for the offence under Section 22[c] of the Narcotic Drugs and Psychotropic Substances Act, 1985 [‘the NDPS Act’, for short] and she has been sentenced to undergo rigorous imprisonment for 12 [twelve] years and to pay a fine of Rs. 1,00,000/-, in default of payment of fine, to undergo simple imprisonment for another one year. It has been observed by the learned Special Court that the accused-appellant would not be entitled to the benefit under Section 428, CrPC.

2. The investigation into the case, Mukalmua Police Station Case no. 314/2019, which resulted into the trial of NDPS Case no. 24 of 2019, commenced on the basis of a First Information Report [FIR] lodged by one Biren Boro, a resident of Village - No. 2 Ghoga [Madlabori], Police Station – Mukalmua, District – Nalbari [the respondent no. 2] before the Officer In-Charge, Mukalmua Police Station on 30.06.2019. In the FIR, the informant-respondent no. 2 – Biren Boro [P.W.1] had inter alia alleged that the accused

had been selling intoxicated substances in their locality from an earlier period. The informant had stated that though the local people had been telling her to stop from carrying out such kind of business, the accused did not stop doing the business. As the business carried out by the accused was causing disturbances in the locality, the local residents, on 30.06.2019, apprehended the accused and recovered the suspected contraband items, mentioned in the FIR, from her house. The matter was thereafter, informed to the Police at Mukalmua Police Station and the suspected contraband items, so recovered, were handed over to them in presence of the Headman of the Village.

3. On receipt of the FIR, the Officer In-Charge, Mukalmua Police Station registered the same as Mukalmua Police Station Case no. 314/2019 for the offence under Section 22[c], NDPS Act on 30.06.2019 and took up the investigation of the case himself. The accused was taken into custody on 30.06.2019 itself. On being handed over the suspected contraband items, so recovered by the villagers, the Police personal who arrived at the place of occurrence [P.O.], on receipt of information to that effect, prepared a Seizure List, Ext.-2 in connection with the suspected contraband items and took the accused to the Police Station along with the suspected contraband items, so recovered and seized from the house of the accused.

4. During the course of investigation, the Investigation Officer [I.O.] & Officer In-Charge, Mukalmua Police Station, P.W.9 recorded statements of a nos. of witnesses under Section 161, CrPC and drew up a Sketch Map of the P.O. [Ext-3], which was stated to be the courtyard of the house of the accused. On 30.06.2019, the I.O., P.W.9 also prepared an Inventory of the seized contraband

items [Ext.-7]. The I.O., P.W.9 submitted an application, on 01.07.2019, before the jurisdictional Magistrate by submitting the Seizure List [Ext.-2] and the Inventory [Ext.-7]; and producing the seized contraband items before him, making a prayer to allow drawal of samples from them and to send the samples for examination to the Forensic Science Laboratory [FSL]. On being permitted by the learned Magistrate, samples were drawn from the seized contraband items and forwarded those samples to the FSL, Directorate of Forensic Science [DFS], Assam at Kahilipara, Guwahati for examination. As in the meantime, P.W.9 was transferred, another Investigating Officer, Utpal Kumar Nath completed the remaining part of the investigation by collecting the FSL Report from the Directorate of Forensic Science [DFS], Assam. After completing investigation into the case, Mukalmua Police Station Case no. 314/2019 [corresponding G.R. Case no. 1180/2019], the I.O. submitted a charge-sheet under Section 173[2], CrPC vide Charge Sheet no. 292/2019 on 31.10.2019 [Ext.-4] finding a *prima facie* case under Section 22[c], NDPS Act well established against the accused.

5. On submission of the charge-sheet, the learned Special Court after hearing the learned Special Public Prosecutor and the learned defence counsel and upon perusal of the materials available in the case records, initially framed a charge against the accused on 17.01.2020 under Section 22[b] of the NDPS Act. Subsequently on 05.04.2021, the learned Special Court having regard to the quantity of contraband items involved in the case, altered the charge in the following manner :-

That you on 30.06.2019 at 02:00 p.m. at village no. 2 Ghoga [Madlabori] under Mukalmua PS were found in possession of 1078 nos of 'Spas Won' tablets, 1091 nos of 'We care Alprazolam' tablets, 70 nos of 'Nitrazepam' tablets, 1 bottle of 'Kuffcare-C' cough syrup and 4 bottles of 'Lykarex' cough syrup in

contravention of provision of the NDPS Act and thereby committed an offence punishable u/s 22[c] of the NDPS Act.

6. When the charge framed under Section 22[c] of the NDPS Act, 1985 was read over and explained to the accused, she pleaded not guilty and claimed to be tried. During the course of the trial, the prosecution side examined ten nos. of witnesses – [i] P.W.1 : Biren Boro; [ii] P.W.2 : Unush Ali; [iii] P.W.3 : Sanjit Boro; [iv] P.W.4 : Rimen Boro; [v] P.W.5 :- Mina Boro; [vi] P.W.6 :- Dipali Boro; [vii] P.W.7 :- Madhuri Boro; [viii] P.W.8 : Minati Boro; [ix] P.W.9 : Jayanta Kumar Barman, the I.O. & Inspector of Police & Officer In-Charge, Mukalmua Police Station; and [x] P.W.10 : Chandan Das, FSL Expert; and exhibited six nos. of documents – [i] Ext.-1 : the FIR; [ii] Ext.-2 : the Seizure List, M.R. no. 93/2019 [iii] Ext.-3 : the Sketch Map of the P.O.; [iv] Ext.-4 : the Charge-Sheet no. 314/2019; [v] Ext.-5 : the FSL Report of the DFS dated 30.06.2019; [vi] Ext.-6 : the Forwarding Letter to the Report of the DFS, Assam; and [vii] Ext.-7 : the Inventory dated 01.07.2019.

7. After closure of evidence from the prosecution side, the accused was examined under Section 313, CrPC by placing before him the incriminating materials emerging from the evidence of the prosecution witnesses. The plea of the accused was of denial. However, the accused did not adduce any evidence in her support. After hearing the learned counsel for the parties and appreciation of the evidence/materials on record, the learned Special Court passed the impugned Judgment convicting the accused for the offence under Section 22[c], NDPS Act and the accused has been sentenced in the manner, mentioned above.

8. We have heard Mr. N. Uddin, learned counsel for the accused-appellant; and Ms. A. Begum, learned Additional Public Prosecutor for the respondent State.

9. Mr. Uddin, learned counsel for the accused-appellant has submitted that there was total non-compliance of the prescriptions contained in Section 42, NDPS Act, which has provided for the procedures for entry, search, seizure, arrest, etc. in respect of offences in connection with contraband substances under the NDPS Act, 1985. In the case in hand, it was the co-villagers of the accused, who had made forcible entry into the house of the accused on the date of the incident. During the subsequent search purportedly carried out after such entry, the villagers alleged to have recovered the contraband items, mentioned in the FIR and the charge. In the process, the mandatory procedure required to be followed as laid down in Section 51, NDPS Act and Section 100, CrPC were given a complete go-by. It was only after the alleged recovery of the contraband items, the Police was informed. The Police personnel who arrived at the place of occurrence [P.O.] subsequent to such search and recovery, had prepared the Seizure List, Ext.-2 of the allegedly recovered contraband items and arrested the accused. It is the contention of the learned counsel for the accused-appellant that the investigation carried out after such illegal search and recovery was in total non-compliance of the provisions contained in Section 42 of the NDPS Act. The offence[s] under the NDPS Act, 1985 being serious in nature and the person[s] convicted of the offence[s] is/are to be visited with stringent punishment[s] on conviction, the procedure requires strict compliance. In view of such non-compliance and blatant violation of the mandatory procedure, as highlighted above, the learned counsel has contended the Judgment and Order

of conviction and sentence passed against the accused-appellant is not sustainable in law and the same is liable to be set aside.

10. Opposing the contentions of the learned counsel for the accused-appellant, Ms. Begum has contended that after recovery of the suspected contraband items, there was due compliance of the procedure laid down in Section 52A of the NDPS Act regarding preparation of inventory, taking of photographs of the seized contraband items and permission to draw samples therefrom, with due certification from the jurisdictional Magistrate. It is the further contention of the learned Additional Public Prosecutor that the quantity of contraband items recovered from the house of the accused undoubtedly fell into commercial quantity and as such, the acts of search and recovery made by the co-villagers from the house of the accused would not vitiate the investigation of the case as the required procedure were followed substantially during the course of investigation to submit the charge-sheet. It is contended that the testimonies of the prosecution witnesses had clearly established that the accused was involved in the business of contraband items from her own house premises. Contending so, the learned Additional Public Prosecutor has submitted that the Judgment and Order of conviction and sentence does not, at all, require any interference.

11. We have given due consideration to the rival submissions of the learned counsel for the parties and have also perused the evidences/materials available in the case record of NDPS Case no. 24/2019, in original.

12. Out of the ten prosecution witnesses [P.W.s], the prosecution witnesses – P.W.1, P.W.2, P.W.3, P.W.4, P.W.5, P.W.6, P.W.7 & P.W.8 – were co-villagers

and/or relatives of the accused. P.W.9, Jayanta Kumar Barman, the then Officer In-Charge, Mukalmua Police Station was the I.O. for the first part of the investigation, after search and recovery, and P.W.10 was the Scientific Officer, Drugs and Narcotic Division, Directorate of Forensic Science [DFS], Assam.

13. Before any discussion on the testimonies of the prosecution witnesses, it is relevant to mention that the contraband items involved in the case were : [i] 1078 nos. of 'Spas Won' capsules, [ii] 1091 nos. of 'WE care Alpraxolam' tablets; [iii] 70 nos. of 'Nitrazepam' tablets; [iv] 1 bottle of 'Kuptcare-C' cough syrup; and [v] 4 bottles of 'Lykarex' cough syrup, which were shown to have been allegedly seized on 30.06.2019 vide the Seizure List, M.R. no. 93/2019 [Ext.-2]; and also reflected in the charge framed against the accused on 05.04.2021. Admittedly, the total quantity of the contraband items, mentioned above, fell in the category of commercial quantity. There was no contest on this aspect from the defence side during the trial.

14. As the learned counsel for the accused-appellant has strenuously contended regarding the manner of search and recovery of the contraband items from the house of the accused, it appears apposite, at this juncture, to explicate on the evidence led by the prosecution side in that connection.

15. P.W.1, Biren Boro identified himself to be a Sabhapati [President] of the village, that is, Village no. 2 Ghoga [Madlabari]. P.W.1 deposed to the effect that for about 4-5 years, villagers were suspecting that the accused was carrying out illegal activities from her house. On the date of the incident, villagers along with him, had made a search of the house of the accused. On being searched,

several tablets and bottles of codex were found in the house of the accused and those were suspected to be contraband items. It was then, decided to inform the Police. On being informed, Police personnel from Mukalmua Police Station arrived at the place and inspected the house of the accused and seized the suspected contraband items from the house of the accused. He claimed that he was present when the Police personnel seized the contraband items from the house of the accused. He deposed that the Police personnel took the accused along with the contraband items to the Police Station. In cross-examination, P.W.1 stated that about 30/40 villagers comprising of both males and females, went to the house of the accused to search the house. Though all of them did not enter into the house of the accused at the time of search, about twelve women from the village entered into the house of the accused and searched the house, while the male members of the team remained outside the house. P.W.1 further stated that he did not read the contents of the FIR [Ext.-1] wherein he gave his signature as Ext.-1[1]. P.W.1 further disclosed, in his cross-examination, that at the time of making the search, the husband, the son, the father-in-law and the mother-in-law of the accused were present in the house, apart from the accused. P.W.1 further stated that they did not inform the Police and the Gaonburah prior to checking and searching the house of the accused. P.W.1 had denied a suggestion that they had forcefully implicated the accused by telling that the contraband items were recovered from her house.

16. P.W.2, Unush Ali was the son of the Gaonburah of the village, Village – Balikusi viz. Giasuddin Ahmed. As his father was bed ridden due to ailments, the villagers called him to represent his father and to accompany them to the house of the accused, by informing him that the Police personnel had already

arrived at the house of the accused. P.W.2 stated that he accordingly went there and by going there, he noticed the contraband tablets and bottles in the house compound of the accused. He stated that Police seized the same and took his signature in the Seizure List, prepared by the Officer In-Charge, Mukalmua Police Station [P.W.9] at the place of seizure. He exhibited the Seizure List [Ext.-2] with his signature therein as Ext.-2[1]. In cross-examination, P.W.2 stated that the Seizure List [Ext.-2] was prepared after his arrival at the place of seizure but he did not go through the same before putting his signature as he was not acquainted with English language.

17. P.W.3, Sanjit Boro knew P.W.1 as well as the accused, who was his relative. P.W.3 deposed to the effect that the accused was found engaged in selling contraband items and the villagers noticed visits of large nos. of people to her house for some time. On the incident, he deposed that a large nos. of villagers, both male and female, made the search in the house of the accused and found contraband items therein. P.W.3 stated that he was also present at the time of search and recovery of the contraband items from the house of the accused. He further stated that only the women from the village entered inside and searched the house of the accused on that day. Thereafter, the Gaonburah was called and the Police was informed. Police personnel took custody of the recovered items from the house of the accused in his presence by preparing a Seizure List [Ext.-2] wherein he subscribed his signature as Ext.-2[2]. In cross-examination, P.W.3 stated that he was present at the time of arrival of Police. As regards entry and recovery, P.W.3 stated that about thirty villagers were present at that time and ten to twelve women from the village made the search inside the house of the accused on that day and found contraband items, which were, later on, seized.

He named few of those women, who made the search and recovery. He further stated that he could not say about the items the women brought out from the house of the accused. After arrival of the Police personnel, the recovered contraband items were seized and photographs were taken before preparing the Seizure List.

18. P.W.4, Rimen Boro knew the informant [P.W.1] and the accused, as they were his co-villagers. Like P.W.1 and P.W.3, P.W.4 also deposed to the effect that visits of outsiders to the house of the accused were noticed by the villagers for a long time and accordingly, the villagers decided to go to the house of the accused to find out the reason behind such frequent visits of outsiders to her house. As regards the incident, P.W.4 stated that on the date of the incident, the villagers, comprising of both male and female members, went to the house of the accused and few women made a search in the house of the accused and made recovery of contraband tablets and bottles from inside the house. He stated that he was present at the time of such search and recovery whereby the village women recovered those contraband items and bottles from the house of the accused. P.W.4 stated that the Village President was thereafter, informed and after arrival of the Village President, Police was informed. The Police personnel after their arrival, seized the recovered contraband items from the P.O. by preparing the Seizure List [Ext.-2] wherein P.W.4 gave his signature as Ext.-2[3]. In cross-examination, P.W.4 denied the suggestions made to him. He stated that he did not read the contents of the Seizure List [Ext.-2] before giving his signature therein. He further stated that he did not enter inside the house of the accused.

19. P.W.5, Mina Boro, another co-villager, deposed that she knew both the informant [P.W.1] and the accused. P.W.5 testified to the effect that villagers noticed frequent visits of outsiders to the house of the accused spoiling the atmosphere of the locality since long. Corroborating the testimony of the other P.W.s, P.W.5 stated that on the date of the incident, a group of villagers, comprising of both male and female members, went to the house of the accused and about twelve women including herself, P.W.7 and P.W.8 made searches inside the house of the accused and recovered contraband tablets and bottles. P.W.5 further stated that after such search and recovery, the Village Gaonburah was called and on being called, the son of the Village Gaonburah, P.W.2 came to the place. The Police was thereafter, informed. After arrival of the Police personnel, the recovered contraband items and the accused were handed over to the Officer In-Charge, Mukalmua Police Station [P.W.9]. P.W.9 then asked P.W.4 and one Banti Boro to count the recovered contraband items. Thereafter, the Police seized the same and took custody of both the contraband items and the accused. During cross-examination, P.W.5 reiterated that about twelve women including herself, P.W.6, P.W.7 and P.W.8 made searches in the house of the accused and recovered the contraband items. P.W.5 also stated that earlier, the accused was asked to stop from carrying out the activities in her house. P.W.5 admitted that neither the Police nor the Gaonburah was informed at any earlier point of time as regards the alleged activities carried out by the accused in her house. On the date of the incident also, the Gaonburah was not previously informed that the villagers were going to the house of the accused to search the house. P.W.5 denied the suggestions given to her by the defence side.

20. P.W.6, Dipali Boro, another co-villager, corroborated the testimonies of the other witnesses to the effect that the accused was earlier asked to refrain from selling contraband items in the village. As the accused did not listen to such advices, the villagers decided to search the house of the accused. Accordingly, the search of the house of the accused person was carried out on the date of the incident and during the search, recovery of contraband items like tables and bottles were made. Then, the villagers apprehended the accused and informed the Police. The accused and the contraband items so recovered after search, were, later on, handed over to the Police. In cross-examination, this witness denied all the suggestions given to her by the defence.

21. P.W.7, Madhuri Boro, a co-villager and a niece of the accused, stated that she knew the informant [P.W.1] and the accused. P.W.7 deposed that contraband items like tables and bottles were recovered from the house of the accused when village women searched the house of the accused. The villagers earlier asked the accused to refrain from selling contraband items. P.W.7 further stated that after recovery of the contraband items from the house of the accused, the Village President [P.W.1] and the Police were informed. After arrival of the Gaonburah and the Police personnel, the accused and the contraband items recovered during the search, were handed over to the Police personnel. P.W.7 further stated that on the date of the incident, several villagers were present in the house of the accused. In cross-examination, P.W.7 denied all the suggestions given to her by the defence.

22. P.W.8, Minati Boro was another co-villager who knew the informant [P.W.1] and the accused. P.W.8 stated that it was noticed by the villagers that the

accused was doing business of selling contraband items and the villagers noticed frequent visits of outsiders to her house. The accused was asked to refrain from selling the contraband items but the accused did not pay any heed. On the date of the incident, a group of villagers, comprising of both male and female villagers, went to check inside the house of the accused and on checking the house of the accused, bottles of contraband items and contraband tablets, kept under a LPG cylinder by making a hole on the earth and above, were found. Those contraband tablets and bottles were recovered and the Village Gaonburah, the Village President and the Police were informed thereafter. The Village President [PW.1] and the Police personnel arrived at the place on receiving of such information about recovery of contraband items in the house of the accused. Thereafter, the accused and the contraband items so recovered, were handed over to the Police. The Police personnel then took the accused and the contraband items to the Police Station. In cross-examination, P.W.8 stated that earlier, the villagers did not inform the Police that the accused was involved in selling contraband items at their village. All the suggestions put to this witness by the defence side were denied. P.W.8 had, however, admitted that she did not state before the Police in her previous statement that the contraband items were found kept in the bag under LPG cylinder by making a hole on the earth and above.

23. From a combined reading of the testimonies of the above prosecution witnesses, it has unerringly emerged that it was the co-villagers, numbering about thirty, who proceeded to the house of the accused on the date of the incident, that is, 30.06.2019. The reasons behind proceeding together in such manner to the house of the accused on the date of the incident were, according

to these P.W.s, that the accused, for a long time, appeared to be involved in the activity of selling contraband items to persons, who used to make frequent visits to her house and indulgence of the accused in such activities had disturbed the peaceful atmosphere in the village. It has further emerged that after assemblance of the villagers near the house of the accused, about ten to twelve women from among those villagers entered into the house of the accused and carried out searches inside the house of the accused. It has further emerged that at the time of such searches, the other inmates of the house like the husband, the son, the father-in-law and the mother-in-law of the accused were also present. It has further emerged that upon such searches, the villagers had purportedly recovered suspected contraband items, as mentioned in paragraph 13 above, from the house of the accused. It has further emerged that it was after such search and recovery, the Village Gaonburah and the Village President [P.W.1] were informed. It has not emerged from the evidence/materials on record that in what capacity, the informant-P.W.1 had claimed himself to be the Village President. It is not discernible from the materials that the status of P.W.1 as a Sabhapati [President] of the village was recognized in any official manner. In so far as the Village Gaonburah is concerned, it has emerged from the testimonies of the prosecution witnesses that at the time of the incident, the Village Gaonburah, Giasuddin Ahmed was suffering from ailments and in his place, his son, Unush Ali [P.W.2] came to the P.O. It has been established from the evidence that after search and recovery of the suspected contraband items, the villagers decided to inform about the matter to Mukalmua Police Station.

24. The events after arrival of the Police personnel from Mukalmua Police Station at the P.O. can be noticed from the testimonies of the then Officer In-

Charge, Mukalmua Police Station [P.W.9] and P.W.10, who gave the FSL Report on the seized contraband items.

25. In his testimony, P.W.9 stated that at about 01-30 p.m. on 30.06.2019, the President of Village no. 2, Ghoga [Madlabari], P.W.1 informed him over telephone that the villagers of Village no. 2, Ghoga kept the accused apprehended at her house along with certain suspected contraband items. P.W.9 stated that after getting the information, he conveyed the information to the Superintendent of Police, Nalbari and as per his Superior Officer's instruction, he visited the P.O., that is, the courtyard of the house of the accused situated at Village no. 2, Ghoga. On reaching the P.O., he found the accused with the contraband items in her possession. The accused was thereafter, taken into custody and he seized the contraband items found in possession of the accused in presence of witnesses, by preparing a Seizure List [Ext.-2] at the P.O. itself. He testified that the contraband items, as mentioned above in paragraph 13 above, were seized vide Seizure List [Ext.-2] and he identified his signature therein as Ext.-2[4]. He further stated that the signature of the accused was also taken in the Seizure List and he identified the signature of the accused as Ext.-2[5]. The FIR [Ext.-2] was thereafter lodged at about 05-00 p.m. on 30.06.2019 by P.W.1. P.W.9 further stated that he sealed the packets of the seized contraband items and brought the accused along with the seized contraband items to the Police Station. It was after receipt of the FIR [Ext.-1], the case, Mukalmua Police Station Case no. 314/2019 under Section 22[c], NDPS Act was registered. P.W.9 further stated that he made another visit to the P.O. on 01.07.2019 to record the statements of the witnesses and to prepare the Sketch Map of the P.O.[Ext.-3]. P.W.9 further stated that he prepared an

Inventory of the seized articles and produced the same before the learned Magistrate and took samples from the contraband items. A prayer was made before the learned Magistrate by him [P.W.9] to send the samples, which were taken from the seized contraband items, to the FSL for examination. It was thereafter, the samples were taken out from the seized contraband items and forwarded to the FSL for examination. As before completing investigation he [P.W.9] was transferred from the post of Officer In-Charge, Mukalmua Police Station, the remaining part of the investigation was completed by his successor Officer In-Charge viz. Utpal Kumar Nath, Inspector of Police. P.W.9 stated that the successor I.O. collected the FSL Report and submitted the Charge-Sheet [Ext.-4] against the accused.

25.1. In cross-examination, P.W.9 stated the villagers found the contraband items in possession of the accused and kept the accused apprehended with the contraband items. On receipt of the information regarding recovery of contraband items from the possession of the accused, a General Diary Entry no. 701 dated 30.06.2019 was registered. The said General Diary Entry was, however, not exhibited during the trial. As regards the P.O., P.W.9 stated that the P.O. was the house [courtyard] of the accused located in Village no. 2, Ghoga [Madlabari]. P.W.9 further stated that it was the villagers who informed him about the recovery of contraband items from the house of the accused. P.W.9 stated that the villagers did not specify from which room of the house of the accused, the contraband items were recovered. On reaching the P.O. after getting the information, P.W.9 noticed that the contraband items were with the accused in the courtyard of the house of the accused and the contraband items were kept in a white carton box.

25.2. After cross-examination, he was further examined by the prosecution. During such further examination, P.W.9 mentioned about the contraband articles which were seized vide Seizure List [Ext.-2]. He further deposed about the preparation of the Inventory of the seized contraband items articles and exhibited the Inventory as Ext.-7 and identified his signature and the signature of the learned Magistrate on it as Ext.-7[1] and Ext.-7[2] respectively. When he was further cross-examined by the defence, P.W.9 denied the suggestion that he did not seize the contraband items, mentioned in Ext.-2, as per the Seizure List and the Inventory.

26. P.W.10, Chandan Das was working, on 04.07.2019, as the Scientific Officer in the Drugs & Narcotic Division, Directorate of Forensic Science [DFS], Assam. P.W.10 stated that on 04.07.2019, he received a parcel from his Director in connection with Mukalmua Police Station Case no. 314/2019 for examination. The parcel consisted of the following exhibits enclosed in a sealed carton box with cloth cover :-

Description of Articles:

1 (one) sealed envelop having:

1. One strip with eight no's of light blue coloured capsules, weighing 4.8304 g ($0.6038\text{g} \times 8 = 4.8304\text{g}$), branded as 'SPAS-TRANCAN PLUS'. Marked as DN-485/2019(a).

2. One cut strip with ten no's of tablets weighing 1.52g ($0.1520\text{g} \times 10 = 1.52\text{g}$), branded as 'Alpracan 0.5', marked as DN-485/2019(b1) to DN-485/2019(b10) respectively.

3. One cut strip with four no's of tablets weighing 2.7052g ($0.6763\text{g} \times 4 = 2.7052\text{g}$), branded as 'NITRACARE-10', marked as DN-485/2019(c1) to DN-485/2019(c4) respectively.

4. One sealed plastic bottle with 100 ml liquid substances, branded as 'Kuffcare-C', marked as DN-485/2019(d).
5. One sealed plastic bottle with 100 ml liquid substances, branded as 'Lykarex', marked as DN-485/2019(e).

P.W.10 deposed that he carried out examination of the exhibits and recorded his findings in a report, which he exhibited as Ext.-5. The results of the examination recorded in Ext.-5 were as under :-

Result of examination:

The exhibits DN-485/2019(a) gave positive test for Tramadol and the amount of Tramadol per capsule was found to be 48.5 mg.

The exhibits DN-485/2019(b1) to DN-485/2019(b10) gave positive test for Alprazolam and the amount of Alprazolam per exhibit was found to be 0.4 mg.

The exhibits DN-485/2019(c1) to DN-485/2019(c4) gave positive test for Nitrazepam and the amount of Nitrazepam per exhibit was found to be 8.85 mg.

The exhibits DN-485/2019(d) and DN-485(e) gave positive tests for Codeine (present as Codeine Phosphate) and the amount Codeine Phosphate in the exhibits were found to be 158.9 mg and 39.3 mg respectively.

P.W.10 also exhibited a Forwarding Letter [Ext.-6] whereby Ext.-5 Report was forwarded to the Officer In-Charge, Mukalmua Police Station. When P.W.10 was cross-examined, he stated that he did not see the examined materials before him.

27. Before going to the aspects of search, recovery and seizure of the contraband items, mentioned in the Seizure List [Ext.-2], it appears apt to go

through the evidence/materials regarding the events subsequent to such search, recovery and seizure.

28. As per sub-section [2] of Section 52A, where any contraband or conveyance has been seized and forwarded to the Officer In-Charge of the nearest Police Station or to an officer empowered under Section 53, such officer is required to prepare an inventory of such contraband or conveyance containing such details, mentioned therein, or such other identifying particulars of the contraband or conveyance or the packing in which they are packed or country of origin and other particulars as the Officer In-Charge or the empowered officer, as the case may be, may consider relevant to the identity of the seized contraband or conveyance in any proceedings under the NDPS Act, 1985. The officer has to make an application to a Magistrate for the purpose of [a] certifying the correctness of the inventory so prepared; or [b] taking, in the presence of such Magistrate, photographs of such seized contraband or conveyance and certifying such photographs as true; and [c] allowing to draw representative samples of such contraband items, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn. A mandate is contained in sub-section [3] to the effect that where an application is made under sub-section [2], the Magistrate shall, as soon as may be, allow the application. Sub-section [4] of Section 52A is with a non-obstante clause. It has prescribed that notwithstanding anything contained in the Indian Evidence Act, 1872 or the CrPC, every court trying an offence under the NDPS Act, 1985, shall treat the inventory, the photographs of the seized contraband or conveyance and any list of samples drawn under subsection [2] of Section 52A and certified by the Magistrate, as primary evidence in respect of such offence.

29. It has been observed in the decisions in **Union of India vs. Mohanlal**, [2016] 3 SCC 379; and **Mangilal vs. State of Madhya Pradesh**, [2023] 10 SCR 517; that upon seizure of the contraband, the same has to be forwarded to the empowered officer, as mentioned in Section 53 of the NDPS Act, who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for the purpose of [a] certifying the correctness of the inventory; [b] certifying the photographs of such drugs or substances taken before the Magistrate as true; and [c] to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. As per the mandate contained therein, the samples are to be drawn in presence of the Magistrate and when the samples are drawn and certified by the Magistrate in compliance with sub-sections [2] and [3] of Section 52A, the same would constitute primary evidence for the purpose of the trial. The reason behind such provision is to inject fair play in the process of investigation. It has been held that Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn. It has been observed therein that the provisions of NDPS Act are both stringent and rigorous and therefore, the burden heavily lies on the prosecution to prove strict compliance. Non-production of a physical evidence would lead to a negative inference within the meaning of Section 114[g] of the Indian Evidence Act, 1872.

30. In the case in hand, though the inventory prepared in compliance of the procedure set forth in Section 52A, NDPS Act was exhibited as Ext.-7, the

prosecution did not examine any photographs, taken before the Magistrate and any list of samples, taken before the Magistrate and certified as true by Magistrate, during the course of the trial. It has not emerged from the evidence/materials on record that the seized contraband items were disposed of at any subsequent time by taking necessary permission from the Magistrate in the manner envisaged in Section 52A[1] of the NDPS Act. It was incumbent for the prosecution to produce and exhibit the entire quantities of seized contraband, as mentioned in the Seizure List [Ext.-2], which were allegedly seized from the possession of the accused in the trial. Even if, it is accepted for arguendo, that the physical evidence of the seized contraband items are not required to be produce in view of the proving the Inventory, certified by the Magistrate, as Ext.-7, it was incumbent on the part of the prosecution to produce and exhibit the photographs and the list of samples taken before the Magistrate and certified by the Magistrate as true and correct during the course of the trial. Non-production of such documentary evidence in the case in hand has resulted in absence of the primary evidence as regards the drawal of samples, giving rise to a situation to draw a negative inference within the provision of Section 114[g] of the Indian Evidence Act, 1872.

31. Coming to the matters regarding search and recovery, it is found that the NDPS Act has set forth a procedure in Section 42 thereof identifying the officers of the Central Government or the State Government, as the case may be, who having a reason to believe from personal knowledge or receiving information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under the NDPS Act has been committed or any document or other

article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of the NDPS Act is kept or concealed in any building, conveyance or enclosed place can [a] enter into and search any such building, conveyance or place; [b] in case of resistance, break open any door and remove any obstacle to such entry; [c] seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under the NDPS Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under the NDPS Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of the NDPS Act; and [d] detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under the NDPS Act, by complying with the procedure laid down therein.

32. In the case in hand, no such search and recovery of the allegedly seized contraband items were made by any officer empowered under Section 42 of the NDPS Act. As has been established by evidence, already adumbrated hereinabove, it was the villagers, who had taking up the cudgel of punishing the accused, on the basis of their nursing a suspicion that the accused was carrying out illegal activities in contraband items from the precinct of her house, entered into the house of the accused on the date of the incident and claimed that the contraband items, found mentioned in Seizure List [Ext.-2], were recovered by

carrying out searches inside the house of the accused. That no official, as mentioned in Section 42 of the NDPS Act, had entered into, searched inside and recovered the contraband items from inside the house of the accused, is demonstratively evident from the following report made by P.W.9 in the Seizure List, M.R. no. 93/2019 [Ext.-2] :-

‘On 30.06.2019 at around 02-00 p.m. local public at Village - No. 2 Ghoga [Madlabari], P.S. Mukalmua approached one Smti. Jetuki Boro, wife of Rubul Boro, Village - Madlabari [No. 2 Ghoga], P.S. Mukalmua and handed over her along with suspected to be drugs noted above and 01 [one] Mobile Handset which were recovered from her custody.’

33. Section 51 of the NDPS Act has prescribed that the provisions of the Code of Criminal Procedure, 1973 [‘CrPC’ or ‘the Code’] shall apply, in so far as they are not inconsistent with the provisions of the NDPS Act inter alia to search and seizures made under the NDPS Act. As no specific procedure for search is mentioned in the NDPS Act, it is the procedure laid down in Section 100 of the Code, more particularly, sub-section [4] and sub-section [5] thereto would be applicable. As per sub-section [4] of Section 100 of the Code, before making a search under that Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do. As per sub-section [5] of Section 100 of the Code, the search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively

found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

33.1. The Hon'ble Supreme Court of India in **State of Punjab vs. Balbir Singh**, [1994] 3 SCC 299, has inter alia observed that the provisions of arrest, warrant, search and seizure are incorporated in Sections 41 to 60, 70 to 81, 93 to 105 and 165, CrPC. It has been noticed that NDPS Act is not a complete code incorporating all the provisions relating to search, seizure or arrest etc. It has been further noticed that after incorporating the broad principles regarding search, seizure or arrest etc. in Section 41, Section 42, Section 43 and Section 49 of the NDPS Act, it has been laid down in Section 51 of the NDPS Act that the provisions of CrPC shall apply in so far as they are not inconsistent with the provisions of the NDPS Act to all warrants issued and arrests, searches and seizures made under that Act. Therefore, the provisions of Section 100, CrPC and Section 165, CrPC which are not inconsistent with the provisions of the NDPS Act are applicable for effecting search, seizure or arrest under the NDPS Act also. It has been observed that the words 'in so far as they are not inconsistent with the provisions of this Act' in Section 51 of the NDPS Act are of significance. Reference has also been made to Section 4 of the CrPC which has provided that all offences under any other law shall be investigated and inquired as mentioned therein. It has been held that consequently, the provisions of the CrPC shall be applicable in so far as they are not inconsistent with the NDPS Act to all warrants, searches, seizures or arrests made under the NDPS Act. If the Officer happens to be one of those empowered officers under

the NDPS Act then also, he must follow thereafter the provisions of the NDPS Act and continue the investigation as provided thereunder. If on the other hand, he is not empowered then the obvious thing he should do is that he must inform the empowered officer under the NDPS Act who should thereafter, proceed from that stage in accordance with the provisions of the NDPS Act. It has been held that non-compliance of these provisions in Section 100, CrPC would amount to an irregularity and the effect of the same on the main case depends upon the facts and circumstances of each case. In such a situation, the court has to consider whether any prejudice has been caused to the accused and also examine the evidence in respect of search in the light of the fact that these provisions have not been complied with and further consider whether the weight of evidence is in any manner affected because of the non-compliance.

33.2. It is settled that as an accused if found guilty of an offence involving commercial quantity of any contraband, is visited with serious consequences, there has to be strict compliance of the procedure. In an investigation involving contraband substances, 'search', 'recovery', 'possession' and 'seizure' are vital parts of the investigation and strict compliance are necessary to ensure that a person is not falsely implicated. Search being an integral part of the investigation under the NDPS Act and is a vital means to get evidence of the offence, an accused is entitled to the safeguards envisaged in the NDPS Act and the Code. If the safeguards are not followed, the logical consequence would be that the search would not have the same credibility which a search should have.

33.3. Reverting back to the facts of the case in hand, a large nos. of villagers, on the date of the incident went to the house of the accused and

entered into the house of the accused, notwithstanding protest/resistance or otherwise from the accused or any inmates of the house. After entry into the house, the group villagers which comprised of about ten to twelve women carried out searches inside and claimed to have found the alleged contraband items, listed in the Seizure List [Ext.-2]. At that relevant point of time, that is, at the time of entry into and carrying out searches inside the house of the accused, neither any responsible village functionary nor any Police personnel, not to speak of the Officers mentioned in Section 42 of the NDPS Act, was present. If such a manner of search is permitted and recognized to carry out for recovery of any suspected contraband substance, that too, by a large no. of persons in a dwelling house of a person on the premise that there was suspicion that the person was in possession of suspected contraband substances, the same would be in disregard to the procedure prescribed by the NDPS Act and the Code. There would also arise a possibility of planting contraband items inside such house to foist the liability upon such person by a group of persons who are not favourably disposed towards the person and then, no safeguards contemplated in the NDPS Act read with Section 100, CrPC would be available to such a person. Such a possibility cannot be ruled out in the present case also as the villagers were of the view that frequent visits of outsiders to the house of the accused for a some period of time had spoiled the atmosphere in the village. As the villagers had already suspected that the accused was carrying out clandestine activities with regard to contraband items in the house and had made an opinion that it had disturbed the atmosphere in the village, the villagers assembled including the persons who made the searches, cannot be said to be in the category of neutrally disposed towards the accused when they proceeded to the house of the accused on the date of the incident and entered

into the house and carried out the searches claiming recovery of the suspected contraband items. If the villagers had a suspicion that the accused had been carrying out clandestine activities in contraband substance from her house for a number of years, the best thing they could have done was to inform the Police about involvement of the accused in the clandestine business in contraband items from the precincts of her house for the Police to take the necessary steps as per law. The manners in which the searches inside the house of the accused and the recovery of suspected contraband items were made from inside the house of the accused preceding their seizure by Police cannot receive judicial imprimatur. Such kind of entry, searches and recovery are found to be to immense prejudice to the accused.

34. In the light of the above discussion made above and for the reasons assigned therein including non-presentation of the primary evidence, as required under Section 52A of the NDPS Act, before the trial court and irregularities committed in the matters of search and recovery to the immense prejudice of the accused, we are of the unhesitant view that the Judgment and Order of conviction and sentence passed against the accused cannot stand the scrutiny of law and the accused is clearly entitled to the benefit of doubt. In such view of the matter, the Judgment and Order of conviction and sentence dated 06.08.2021 passed by the Court of learned Special Judge, Nalbari in NDPS Case no. 24/2019 stands set aside. Resultantly, the criminal appeal stands allowed.

35. As during the pendency of the instant criminal appeal, the accused-appellant has been allowed to be released on bail after suspending the

execution of the sentence passed against her, by an Order dated 04.03.2022 passed in an application, I.A.[Crl.] no. 444/2021 preferred under Section 389[1], CrPC, the said Order stands merged with the present order, with the discharge of the bail bond.

36. The case records of NDPS Case no. 24/2019 be sent back forthwith.

JUDGE

JUDGE

Comparing Assistant